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HEARING

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In the Matter of:

Adjustment of the Rates for  
Noncommercial Educational  
Broadcasting Compulsory  
License

Docket No. 96-6  
CARP NCBRA

Library of Congress  
James Madison Building  
101 Independence Avenue, S.E.  
Room LM414  
Washington, D.C. 20540

Thursday,  
March 19, 1998

The above-entitled matter came on for  
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson  
THE HONORABLE EDWARD DREYFUS  
THE HONORABLE JEFFREY S. GULIN

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ORIGINAL

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## I-N-D-E-X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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**Michael Bacon**

By Mr. Kleinberg	1585		1633
By Mr. Weiss		1606	
By Mr. Schaeffer		1640	

**Roy Epstein**

By Mr. Salzman	1659		1694
Voir Dire by Mr. Salzman on page	1643		
By Mr. Weiss		1666	1697
Voir Dire by Mr. Weiss on page	1645		

**Peter Boyle**

By Mr. Shore	1707		1936
By Mr. Rich		1791	1944
By Mr. Kleinberg		1942	

<u>Exhibit No.</u>	<u>Description</u>	<u>Mark</u>	<u>Recd</u>
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PB

20X	Licensing with BMI	1613	1632
21X	Music cue sheet, Last Boss	1637	
22X	06-10-92 Opinion	1813	
23X	10-08-87 Transcript	1843	1846
24X	CPB FY 1990	1867	1872
25X	CBP FY 1985	1867	1872
26X	ASCAP House Testimony	1873	1884
27X	ASCAP Prehearing Submission	1886	1891
28X	Ross Charap Testimony	1901	1909

BMI

1	Earnings	1592	1702
2	Music cue sheet for T.R. Show	1634	1637
3	Dr. Owen's charts	1702	1702

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P-R-O-C-E-E-D-I-N-G-S

(9:32 a.m.)

CHAIRPERSON GRIFFITH: All right. Let the record reflect that the court reporter has been previously sworn and remains under oath.

Ladies and gentlemen, good morning.

We are ready to go, I presume.

MR. KLEINBERG: We are.

CHAIRPERSON GRIFFITH: All right.

MR. KLEINBERG: BMI will call as its next witness, Michael Bacon.

CHAIRPERSON GRIFFITH: Mr. Bacon?

Whereupon,

MICHAEL BACON

was called as a witness, and having been first duly sworn, assumed the witness stand, was examined and testified as follows:

DIRECT EXAMINATION

BY: MR. KLEINBERG

Q Would you state your name please?

A Michael Bacon.

Q Mr. Bacon, tell the Panel what you do for

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1 a living.

2 A I compose and produce music for films and  
3 television shows.

4 Q And could you tell the Panel a little bit  
5 about your background in music?

6 A I started out playing the cello when I was  
7 eight years old. Later on, I played the oboe, playing  
8 in orchestras in Philadelphia, taking private lessons.

9 At the same time, I always had an interest  
10 in folk and popular music; I played the banjo and  
11 guitar.

12 When I got into college I played in rock  
13 bands and shortly after college I became a performer  
14 in the pop music field, recording several records with  
15 groups and on my own for major labels.

16 I toured around the world and played in  
17 coffee houses and colleges. At the time I was living  
18 in Nashville, a very old friend of mine who was a film  
19 maker asked me to write a song for one of his  
20 documentaries.

21 He liked what I did and some other friends  
22 of his heard what I did and asked me to do the same

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1 thing. Eventually, I started writing songs for films.

2 Gradually, more demands were made on  
3 writing instrumental music so I went back to school to  
4 study orchestration and composition.

5 About thirteen years ago I gave up  
6 performing and moved to New York to pursue writing  
7 music for films and television, which I do pretty much  
8 most of my time.

9 I am also in a band with my brother and we  
10 tour around the country playing occasionally.

11 Q What per centage of your composing work is  
12 done with respect to composing music for television  
13 programs?

14 A Ninety per cent.

15 Q Of that ninety per cent how much, on  
16 average, have you spent composing music for public  
17 broadcasting programs?

18 A PBS has been around 60 per cent.

19 Q And could you tell the Panel some of the  
20 PBS shows that you have composed music for? You can  
21 refer to your written testimony if you would like,  
22 sir.

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1           A       A lot of my work is done for a series out  
2 of Boston called the American Experience. They do the  
3 president series which is about to include seven  
4 presidents, most recently profiling Ronald Reagan.  
5 Most of the shows are about four hours long.

6                   My tenure at WGBH is now up to about fifty  
7 hours of programming.

8                   I also work with Bill Moyers on PBS. We  
9 do other profiles for American Experience: Amelia  
10 Ehrhart, Admiral Byrd, the Wright Brothers, the  
11 Hurricane of 1938; Johnstown Flood, which won an  
12 Academy Award in the film version.

13                  The score that I wrote for the Kennedys  
14 won me an Emmy Award. There are other shows: The  
15 Windsors, The Story of Lassie, and Discovering Women.

16           Q       And the Emmy Award was for what, the music  
17 composition?

18           A       For the music composition for The  
19 Kennedys.

20           Q       And The Kennedys was one of the American  
21 Experience shows?

22           A       Right.

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1 Q Could you tell the Panel some of the  
2 commercial network programs you have composed music  
3 for?

4 A I would say my biggest client outside of  
5 PBS is the ABC News Group. I do a lot of work with  
6 Peter Jennings and am involved in a very long form  
7 show with him dealing with the history of the  
8 Twentieth Century.

9 A very highly rated show called Turning  
10 Point; I have done about 20 of those over the years.

11 Also, I work for A&E, Biography Channel,  
12 the Learning Channel, the Discovery Channel, all the  
13 major networks.

14 Q Could you tell the Panel about how much of  
15 your time in hours and weeks you spend composing music  
16 in a given year?

17 A Well, it is a pretty time-intensive job.  
18 I am usually in the office about 8:30 a.m. and get  
19 home about the same time at night. I take a couple of  
20 weeks off a year. I would say that it is about 60  
21 hours a week of pretty intense work to get all the  
22 work that I need to done.

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1 Q In your written testimony you have  
2 indicated that you received BMI royalties, correct?

3 A Yes.

4 Q You also mentioned that, as a composer,  
5 you receive up-front fees. Is that also correct?

6 A Right.

7 Q The up-front fees that you receive when  
8 you are doing composing for television, do you have to  
9 pay expenses out of those up-front fees?

10 A Yes. Essentially I do a package deal. If  
11 someone hires me to write a show, for that amount of  
12 money, I am responsible for hiring musicians if  
13 necessary, hiring the recording studio, all the  
14 incidental costs, tape, all those kinds of things.

15 So, any particular show can include a per  
16 centage of out-of-pocket expenses for me.

17 Q I think that you have indicated in your  
18 written testimony that about one third of the up-front  
19 fees are consumed in by the expenses that you incur in  
20 composing, such as paying the musicians and studio  
21 costs?

22 A Right. As a general rule, if the show

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1 requires musicians, about 25 per cent goes to that and  
2 another 10 per cent to studio costs and tape and all  
3 that sort of thing comes out of my pocket.

4 Q Mr. Bacon, I want to direct your attention  
5 to page three of your written testimony.

6 You indicated there that, with reference  
7 to BMI exhibit 61 which is described as your BMI 1996  
8 earnings statement.

9 Could you turn to exhibit 61 if you have  
10 it?

11 A Sure.

12 Q Could you tell the Panel what that earning  
13 statement is for. I guess I should say for the  
14 Panel's edification that I have already informed Mr.  
15 Rich that I am going to clarify something from the  
16 written testimony that I think needs to be clarified.

17 That is, the royalty statement that is  
18 listed under exhibit 61 is for your writer's share of  
19 BMI royalties, is that correct?

20 A Right.

21 Q As stated, exhibit 61 does not include any  
22 publisher royalties that you have received, correct?

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1 A Yes.

2 Q Do you have a music publishing company?

3 A Yes, I do.

4 Q What is the name of it?

5 A MIMSA; music publishing.

6 Q We have prepared, Your Honors, and showed  
7 to counsel for PBS, an exhibit which will also include  
8 the music publishing royalty for that year so that we  
9 have a full review.

10 I believe that PBS has no objection to  
11 that.

12 CHAIRPERSON GRIFFITH: All right.

13 MR. WEISS: We have no objection, Your  
14 Honor.

15 Q And I guess we will mark that --

16 CHAIRPERSON GRIFFITH: BMI Hearing Exhibit  
17 Number 1, I believe.

18 MR. KLEINBERG: I think that is correct.

19 (WHEREUPON, THE DOCUMENT  
20 REFERRED TO WAS MARKED AS BMI'S  
21 EXHIBIT NO. 1 FOR  
22 IDENTIFICATION.)

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1 Q Just so the record is clear, the BMI  
2 Hearing Exhibit Number 1 shows that your music  
3 publishing earnings under MIMSA for 1996 totaled  
4 \$11,346.96, correct?

5 A Yes.

6 Q Of which, the earnings attributed to PBS  
7 performances were \$2,141.96, correct?

8 A Right.

9 Q Then the total BMI combined royalties that  
10 you and your publishing company received were  
11 \$55,375.64. The combined royalties attributed to PBS  
12 were \$6,140.87.

13 Is that right, Mr. Bacon?

14 A Yes.

15 Q And when you take the total of your BMI  
16 writer and publisher earnings that you have received  
17 from BMI, the amount attributed to PBS equals 11 per  
18 cent of the total, is that correct?

19 A Right; 11 per cent.

20 Q And that is in contrast to 60 per cent of  
21 your work done in composing for PBS, correct?

22 A Right.

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1           Q       Now, would you briefly describe for the  
2 Panel what the process of composing music for  
3 television programs, such as the documentaries that  
4 you have talked about, entails.

5           A       My way of operating is to start very  
6 early. A lot of composers wait until a later time.  
7 But I like to begin very early in a project.

8                   What will normally happen, particularly  
9 with PBS shows is as long as a year in advance, an  
10 editor will call me up and say, as one did for example  
11 for a show called LBJ that I did, I need a two minute  
12 section of music that would describe LBJ's sinking  
13 into the depths of Viet Nam after the Gulf of Tonkin  
14 incident and after two minutes there should be a very  
15 intense 10 second moment, and then it should change  
16 mood and become more neutral.

17                   So, I'll take these words and try to  
18 create a piece of music based on what he has told me.  
19 I haven't seen any pictures as of yet. I will make a  
20 synthesizer demo of it and I'll send it over to him,  
21 he will listen and put it into the picture.

22                   Then he will give me feedback such as it

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1 is too dark or there is too much movement in it, and  
2 maybe I will redo it.

3 He will then take this and maybe try it  
4 somewhere else in the film.

5 In the meantime, other editors might be  
6 calling me up to write other sections.

7 I am also at that point working on a main  
8 theme which is supposed to capture, in the sense of  
9 LBJ, the person as a whole, at his best, maybe a theme  
10 at his worst.

11 Some of these shows may have 10 or 12  
12 themes that reoccur for different meaning within the  
13 show.

14 The process goes on until about six weeks  
15 before the show is actually finished. At that point,  
16 all the music that is going to go into the show has  
17 already been demoed with synthesizers.

18 At that point, I go and replace whatever  
19 amount of the synthesizers with real musicians, based  
20 on the budget.

21 Musicians are either brought into my  
22 studio or another studio that I rent. They are added

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1 to the synthesizers. You mix these all together to  
2 make it sound proper and you have to synchronize it  
3 with the film and deliver it on time.

4 Then the music is mixed with the dialogue  
5 and the sound effects and the film is finished.

6 Q Is the process that you have just  
7 described generally the process that applies when you  
8 are doing documentaries for PBS scoring or composing  
9 for PBS documentaries?

10 A Yes, that is pretty much standard.

11 Q Now, take the American Experience  
12 documentaries, the presidents ones you have described,  
13 how long are those documentaries?

14 A The running time is usually about four to  
15 four and a half hours.

16 Q And, how much music, on average, do you  
17 compose for each hour of the documentary?

18 A It is usually about 2/3 is music.

19 Q For each hour?

20 A For each hour, yes.

21 Q In your written testimony you referred to  
22 theme music in PBS documentaries as being longer.

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1 Could you explain what you mean by that?

2 A Well, particularly in the presidents  
3 series, it is very important to capture this person as  
4 a musical statement because that helps link together  
5 the whole show with disparate elements.

6 So, we spend a lot of time and energy  
7 trying to figure out what two minute long theme is  
8 going to capture someone as opposed to news shows the  
9 music is almost supposed to disappear.

10 In a lot of the PBS shows the music is  
11 very prominent and identifiable with the person.

12 Q Now, is one of the American Experience  
13 shows you composed music about Teddy Roosevelt, TR?

14 A Right.

15 Q And you are aware that we have a tape with  
16 some excerpts from that?

17 A Yes.

18 Q With the Panel's permission, we will show  
19 a little bit of that. We are not going to play the  
20 whole tape; the Panel will have it available.

21 (Whereupon, the videotape played).

22 (Whereupon, the proceedings were recessed

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1 from 9:46 a.m. until 9:50 a.m.)

2 Q Well, we have a copy of the tape for the  
3 Panel which they can view at their pleasure.

4 Mr. Bacon, I think now we are going to  
5 need to go into Executive Session.

6 MR. SCHAEFFER: Is that for lawyers' eyes  
7 only?

8 MR. KLEINBERG: Yes.

9 CHAIRPERSON GRIFFITH: All right, everyone  
10 left now is under the protective order. So we will  
11 commence an Executive Session.

12 (Whereupon, the proceedings went  
13 immediately into Executive Session.)

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1 MR. SHORE: At some point, when we get  
2 into the details of Appendix B, which has been filed  
3 under seal all along, we'll have to close the hearing.

4 CHAIRPERSON GRIFFITH: All right. Other  
5 than that though, we at this time are out of the  
6 executive session and back into our regular open  
7 hearing?

8 MR. SHORE: That is correct.

9 CHAIRPERSON GRIFFITH: And just let the  
10 record reflect that this is a resumption of ASCAP's  
11 direct case.

12 All right, are you ready to proceed?

13 MR. SHORE: Dr. Boyle, would you please  
14 introduce yourself to the Arbitrators?

15 DR. BOYLE: Yes, my name is Peter Boyle.  
16 I am Vice President and Chief Economist for ASCAP.

17 CHAIRPERSON GRIFFITH: Oh, the court  
18 reporter has reminded me that maybe we should place  
19 him under oath.

20 (Laughter.)

21 CHAIRPERSON GRIFFITH: Would you agree  
22 with that?

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1 MR. SHORE: Sure.

2 WHEREUPON,

3 DR. PETER BOYLE

4 was called as a witness, and having first been duly  
5 sworn was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. SHORE:

8 Q Dr. Boyle, would you reintroduce your self  
9 to the Arbitrators?

10 A I am Peter Boyle. I am vice president and  
11 chief economist for ASCAP. I joined ASCAP in 1985 as  
12 the chief economist and became vice president in 1995.

13 Q Can you describe to the Arbitrators your  
14 duties currently?

15 A I am fortunate in my position. I get to  
16 be involved in pretty much the broad range of ASCAP's  
17 operations. In terms of licensing activities, I'd be  
18 involved in preparing license fee proposals we make to  
19 our customers. I participate in the negotiations  
20 generally. I evaluate counter proposals made by the  
21 other side. In those cases where we are not able to  
22 reach agreement at the bargaining table, I prepare

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1 material for court proceedings or CARP proceedings  
2 such as this. I get involved in preparing our  
3 proposal, testifying if necessary.

4 Besides the licensing activities, once we  
5 collect money from our customers, we have to pay that  
6 money out to the writers and publishers, our members  
7 who had music performed by our various customers. We  
8 can really break those functions into two parts.

9 We do a survey to determine what music is  
10 performed. I have overall responsibility for our  
11 various surveys of performances. I work with  
12 independent survey experts to make sure that the  
13 surveys are representative and our members are all  
14 treated fairly, and all the various performances have  
15 an opportunity of coming into the survey. Not all of  
16 them will. In some cases we do samples, but we want  
17 to make sure that all of the performances have an  
18 opportunity of coming into the survey.

19 Once we have identified what music is  
20 performed, we also have to value that to turn it into  
21 payments to our members, to turn it into dollars.  
22 That part of our operations involves a distribution

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1 system, where we have a variety of weights and values  
2 that are applied to the individual performances. I  
3 have overall responsibility for that as well.

4 Whenever there are changes made to that,  
5 I participate in preparing the material for those  
6 changes, reporting it to the board of directors for  
7 their approval, reporting it to the Department of  
8 Justice and the courts when necessary for their  
9 approval.

10 I also work with our membership and  
11 foreign relations staffs in terms of explaining our  
12 surveys and distribution systems to members, answering  
13 members' questions. In the international scene, to  
14 make sure that our members are being treated fairly  
15 for performances overseas, and to explain how we treat  
16 performances of foreign writers and publishers when  
17 they occur in the United States to their  
18 representatives for the various performing rights  
19 societies throughout the world.

20 Q Could you please give the Arbitrators a  
21 brief description of your educational and professional  
22 background?

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1           A       In terms of my educational background, I  
2 attended school here in Washington, D.C. I went to  
3 Georgetown University. I received a bachelor of arts  
4 degree in economics from Georgetown in 1976. I  
5 received my masters degree also from Georgetown, with  
6 a concentration in economics in 1978. I received my  
7 Ph.D. in economics from Georgetown in 1982.

8                   Prior to working at ASCAP, I worked for  
9 three years for the Federal Aviation Administration.  
10 The FAA has a technical center outside Atlantic City  
11 where they do a lot of their research and development  
12 engineering work. I did a variety of planning,  
13 budgeting, cost benefit analysis for the FAA.

14                   Prior to that, I worked for an economic  
15 consulting firm here in Washington, D.C. for three  
16 years. The firm Nathan Associates is ASCAP's, was at  
17 that time and it still is, ASCAP's independent survey  
18 experts. I spent part of my time working on a variety  
19 of survey design issues. That's how I first became  
20 acquainted with ASCAP. I also worked on a variety of  
21 other general economic issues, cost of capital issues,  
22 transportation freight rates, railroad rates, labor

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1 questions, a whole variety of general questions over  
2 the course of those three years.

3 Q You mentioned testifying in rate setting  
4 litigation. Can you describe that further?

5 A Sure. Part of my responsibility at ASCAP  
6 would be to present the economic basis for our  
7 proposals. I have testified in at least four, I  
8 believe, rate proceedings in the federal court and  
9 southern district court to determine reasonable ASCAP  
10 license fees. I have testified in several prior  
11 proceedings before the Copyright Royalty Tribunal for  
12 a variety of fee issues. I think this is the first  
13 time I have had the opportunity to appear before one  
14 of the CARP panels.

15 Q Could you describe the purpose of your  
16 testimony here today?

17 A My purpose of my testimony is to present  
18 the ASCAP's fee proposal for the fees that we think  
19 are reasonable and appropriate for the public radio  
20 and public television stations that are covered by  
21 this license to pay for the access to and use of our  
22 members' music.

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1 Q How did you go about forming your opinion?

2 A (No response.)

3 MR. KLEINBERG: Excuse me. I'm not  
4 hearing.

5 CHAIRPERSON GRIFFITH: Could you keep your  
6 voice up a little bit, Dr. Boyle, please?

7 MR. SCHAEFFER: Is the microphone not  
8 working or --

9 BY MR. SHORE:

10 Q Could you describe how you came about  
11 deriving your opinions?

12 A (No response.)

13 MR. SHORE: Do you guys have a voir dire?

14 MR. RICH: We guys don't.

15 CHAIRPERSON GRIFFITH: All right.

16 THE WITNESS: I'm sorry. What was the  
17 question?

18 BY MR. SHORE:

19 Q Could you describe for the Arbitrators how  
20 you came about forming your opinions?

21 A That is an issue that ASCAP faces all the  
22 time when we have to quote license fees to either new

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1 customers or existing customers. The first thing we  
2 would normally do and again in this case was to take  
3 a look at the industry in which the radio and TV  
4 stations at issue here belong. We take a look at  
5 prior license agreements with that industry, prior  
6 negotiated agreements or agreements that were  
7 determined by the courts or other panels, if  
8 necessary.

9 Then we would take account of any changes  
10 in circumstances, typically encapsulated in revenue  
11 and music use information from the time of the prior  
12 arrangements.

13 In this case, dealing with over-the-air  
14 broadcasters, radio and television broadcasters here  
15 operating under FCC licenses --

16 JUDGE DREYFUS: Could you keep your voice  
17 up, please?

18 THE WITNESS: Certainly I'll try. I'm  
19 sorry.

20 We had a variety of other benchmarks to  
21 look at. We had prior negotiated agreements with the  
22 public television, radio, and public radio

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1 broadcasters. We had prior negotiated agreements with  
2 the commercial television networks. We have court  
3 determined agreements, court-determined fees for the  
4 commercial television networks. We had court-  
5 determined fees for the local television stations and  
6 the agreement that was negotiated pursuant to that  
7 determination. So we looked at those benchmarks to  
8 prepare the proposal we're submitting here.

9 BY MR. SHORE:

10 Q Specifically, which benchmarks did you  
11 look at in determining the reasonable rates for these  
12 particular television stations and radio stations?

13 A Well, first turned to the prior agreements  
14 that were negotiated between the parties. Those were  
15 arms-length agreements across the bargaining table,  
16 and unfortunately found that we couldn't use those  
17 here because they have an explicit provision that  
18 those agreements, those prior agreements are non-  
19 precedential and are not to be used in future rate  
20 setting. That was one of the terms as part of the  
21 whole package we bargained for. Couldn't rely on  
22 those agreements in this situation.

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1           That being the case, I then turned to the  
2 commercial broadcasting industry to take a look at the  
3 negotiated and court-set agreements for commercial,  
4 radio, and TV broadcasters, and tried as I think I may  
5 have just mentioned, to take account of similarities  
6 and differences between that group of broadcasters and  
7 the public radio and TV stations that are performing  
8 ASCAP music here.

9           Q       What similarities and differences did you  
10 focus on?

11          A       I focused again primarily on the economic  
12 similarities and differences that would be summarized  
13 in terms of the respective revenues of the two  
14 industries and also the manner in which and the amount  
15 of music they use, taking into account adjustments for  
16 use of music as well.

17          Q       How did you go about taking that into  
18 consideration?

19          A       Well, if I could perhaps use the board, I  
20 set up a relationship that's shown in paragraph 7 on  
21 page 3 of the testimony. The starting point was the  
22 revenue the commercial broadcasters receive. That's

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1 reported by various government sources. Also took a  
2 look at the license fees that were paid to ASCAP  
3 pursuant to either negotiated agreements or under the  
4 fees determined by the courts in those cases. That is  
5 one part of the revenue side of things.

6 The other thing we had to take a look at  
7 was the revenue for the public broadcasting entities.  
8 In this case, relying on information provided by the  
9 Corporation for Public Broadcasting when they do some  
10 adjustments to the revenue, and focused on the revenue  
11 from private sources. We deducted any of the revenue  
12 from public sources, state or government funding,  
13 federal funding, federal or state funding, colleges  
14 and universities. So strictly revenue from private  
15 sources.

16 In the case of public television, that was  
17 going to take out about half of the revenue from the  
18 various public television stations. In the case of  
19 radio, it was more like 39 percent of the revenue was  
20 deducted there. So those between them really took  
21 care of the revenue side of things.

22 The next point, as I mentioned, is any

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1 differences in music uses. Here we took a look at the  
2 average music use per hour for the public stations,  
3 public broadcasters, and compared that to music use on  
4 an hourly basis for commercial broadcasters.

5 We did separate calculations for both the  
6 radio and the television sides of the business here,  
7 but using the same general formula for each.

8 Q Can you explain a little bit further why  
9 you considered the license fees paid to ASCAP by  
10 commercial broadcasters to be a relevant benchmark?

11 A Well remember, we couldn't look at the  
12 fees that were previously agreed to in our  
13 negotiations with the public broadcasters. One of the  
14 parts of that agreement was explicitly that those fees  
15 would be non-precedential. The commercial  
16 broadcasters have some similarities. They operate  
17 over the air, they operate under FCC licenses, they  
18 have essentially the same parts of the spectrum, they  
19 are providing programming in essentially the same  
20 technical way. So we want to take a look at the fees  
21 that the broadcasters agree with us to pay and we  
22 agree to accept for the fees that were set by the

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1 court, if that was the case and related it to their  
2 revenue. We get an effective rate, essentially, to  
3 what the commercial broadcast industry had agreed to  
4 and what the courts had approved.

5 On the opposite side then, we took a look  
6 at the revenue base for public broadcasting to get an  
7 idea of their revenue relative to commercial  
8 broadcasters, making as I mentioned, some adjustments  
9 for the sources of that revenue to get an idea of the  
10 economic situation, the respective economic situations  
11 of the public and commercial broadcasters.

12 Q We'll come back to some of these portions  
13 of the formula in a bit. Can you explain how you  
14 gathered data to input into your formula?

15 A Well, one of the factors that affected the  
16 calculations we did was the obtaining information from  
17 the public broadcasting sector. The Corporation for  
18 Public Broadcasting publishes reports on the economics  
19 of the public broadcasting sector. The last one that  
20 we had available at the time we were preparing the  
21 testimony was for fiscal year 1995. So that being the  
22 case, we wanted to try to get comparable figures for

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1 the other parts of the analysis, for the commercial  
2 world and for the music use information.

3 The Commerce Department, Bureau of the  
4 Census, publishes information on the revenue for  
5 commercial broadcasters in some of their annual  
6 reports on communication service industries. We were  
7 able to obtain figures for calendar year 1995 from the  
8 government. This is a fiscal year, so there's three  
9 months difference. This would not include, as I  
10 understand it, October, November, December 1995, but  
11 it would have included October, November, December  
12 1994.

13 For the license fees, we keep track of  
14 that in our normal accounting records so we knew what  
15 was paid to us by the broadcasters in 1995.

16 In terms of the music use, we do the  
17 survey of performances that I discussed briefly and  
18 our distribution system. So we went to our records  
19 there to pull information for our survey year, which  
20 actually corresponds to the fiscal year the public  
21 broadcasters reported. So the music use data here and  
22 the revenue for public broadcasting were on the same

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1 time period. This ratio was for a three month,  
2 slightly different period, three months different.

3 Q Would you please run through the revenue  
4 calculations for commercial television?

5 A Sure. The Census report I believe is  
6 contained in the binder behind the tab that says  
7 Appendix C. There is the annual survey of  
8 communications services. The first page, table 11,  
9 deals with radio. The second page, table 12, deals  
10 with television. The first column is for 1995. Under  
11 the operating revenue, the first line of total  
12 operating revenue is for television \$25.155 billion,  
13 revenue for the commercial television broadcasters.

14 We then took a look at collections, the  
15 amounts paid to us in that same year from the  
16 commercial television broadcasters. That is \$110.9  
17 million. So the effective rate, if you divide the  
18 two, is 44/100ths of one percent, .0044 or essentially  
19 44 cents out of every \$100 in revenue is being paid by  
20 the commercial television broadcasters for access to  
21 the ASCAP repertory, where you see the compositions  
22 written and published by our members.

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1 Q Turning to the revenues for public  
2 broadcasters.

3 A That information, as I believe I said was  
4 prepared and reported by the Corporation for Public  
5 Broadcasting. Two or three tabs back is a tab labeled  
6 "1995 CPB Report," which is headed "Public  
7 Broadcasting Revenue for Fiscal Year 1995."

8 If you go into page 5 of that, which is  
9 table 2, that's the source of the data we used. I  
10 suppose if you don't mind, I'd look at this because we  
11 made some deductions. It might be good to summarize  
12 those.

13 The total revenue, which is shown on the  
14 bottom line of that table for fiscal year 1995, which  
15 is about in the center, maybe a little to the right of  
16 center, that column, there are three lines. There's  
17 a total for public broadcasting. Then there is one  
18 labeled PT, which is a total for public television,  
19 and PR, which is the total for public radio.

20 So the total revenue in fiscal year 1995  
21 for TV was \$1.464 billion. In radio, the reported  
22 revenue was \$453.1 million. If you add those up, you

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1 get the total of nearly \$2 billion in revenue that's  
2 shown in that report.

3 Now that accounts for the revenue from all  
4 sources, although there are a couple of caveats and  
5 qualifications I suppose. We didn't have any  
6 individual station by station information to see if  
7 this was strictly a summary of that or if there were  
8 any adjustments. There are some references in the  
9 report to certain off balance sheet items that may or  
10 may not be relevant. Some of them were labeled things  
11 like public performances, so there's a question as to  
12 whether they should be included in any revenue base.

13 I understand that there are some public  
14 radio stations in particular that are part of this  
15 proceeding that don't get funding directly from the  
16 Corporation for Public Broadcasting. It's not clear  
17 from the report itself whether they were included in  
18 this revenue base or not, but this was the published  
19 information made available by the Corporation for  
20 Public Broadcasting.

21 We made some adjustments to that. We took  
22 out --

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1 CHAIRPERSON GRIFFITH: Dr. Boyle, let me  
2 interrupt you just a minute. You have the first  
3 number there, \$1.464 billion as TV. Is that TV or is  
4 that public broadcasting, TV and radio together?

5 THE WITNESS: No. PT is strictly public  
6 television. The line above that, PB is public  
7 broadcasting in total, with some of radio and  
8 television. Then the PR is public radio. So it's  
9 \$1.464 billion for TV and \$453 million for radio, and  
10 a total of \$1.917 billion for all public broadcasting.

11 BY MR. SHORE:

12 Q You were describing what you took out.

13 A Right. We made an adjustment to this  
14 revenue stream. Essentially, we took out the first  
15 six line items, the items dealing with the various  
16 state and federal, what the CPB refers to as tax base  
17 revenue sources, the funding to the Corporation for  
18 Public Broadcasting, federal grants, local and state  
19 government funding, state colleges and universities,  
20 other public colleges and universities.

21 So if you add those numbers up, in the  
22 case of public television, it's a deduction of \$722

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1 million or just under half of the total, 49.3 percent  
2 of the total. So revenue from public sources.

3 In the case of radio, that was a deduction  
4 of \$176.6 million, which is 39 percent of the total  
5 revenue of \$453 million.

6 If you add those two figures up, that  
7 amounts to nearly \$900 million, \$898.8 million to be  
8 precise that we deducted.

9 The rationale really deals with the types  
10 of funding and programming and the mission of the  
11 public broadcasters. They have made the point several  
12 times that they have a government-sponsored mission,  
13 that they do things, they provide programming that  
14 might not be available over the commercial network.  
15 They do all those type of good things for public  
16 policy reasons. We were trying to find a way to  
17 reflect that in the analysis.

18 I think frankly from an economic  
19 perspective, I think I can make a good case and would  
20 prefer to use the top line, the total revenue. That's  
21 what's being made available. Those are the economic  
22 resources to deliver this programming to the viewers

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1 throughout America or listeners in the case of radio.

2 But we were trying to find a reasonable  
3 way to reflect that difference between the public  
4 broadcasters and the commercial broadcasters. The CPB  
5 themselves refer to private revenue and the tax based  
6 or public revenue. So that seemed like a reasonable  
7 distinction to make in this case.

8 For purposes of our fee proposal then, we  
9 took the difference between those two to get private  
10 revenue. In fact, if you were to turn to page 13 of  
11 the report behind that tab, several pages in, one of  
12 the pie charts in the bottom right in fact shows the  
13 private revenue of 51 percent and tax based revenue at  
14 49 percent for public television. The flip side of  
15 that page 14 shows similar figures for public radio.  
16 So it was the designation that CPB uses here.

17 That leaves \$741.9 million in private  
18 revenue for their television side of the stations, and  
19 \$276.5 million for the public radio stations. A total  
20 of just over \$1 billion, \$1.018 billion in private  
21 revenue for public television and radio stations as a  
22 whole that I would use and put back into the formula

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1 that's on the other side of this board, and that I  
2 will flip back to in just a second.

3 Q Just one question before you flip. That  
4 \$1 billion figure, what relation if any, is there  
5 between that amount of private revenue in programming  
6 which is run, in your mind?

7 A Certainly a large portion of that is  
8 donations, payments that people make to have access to  
9 the programming supplied by public radio and  
10 television stations, some of its grants from  
11 corporations and other private sources. I think it's  
12 all directly program related to provide the kind of  
13 programming that the public wants to see on television  
14 and listen to on the radio. A lot of it is revenue  
15 that generates from the pledge drives and things, all  
16 the other various fundraising activities.

17 So then the middle part of the equation on  
18 the other side deals with the revenue for the public  
19 broadcasting sector. That will be these two columns  
20 of numbers separately for radio and television. So on  
21 the TV side, that is \$741.9 million in revenue, by  
22 revenue from private sources.

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1           If you multiply that by the effective rate  
2       in the commercial broadcasting stations, that would  
3       mean a total fee of \$3.264 million.

4           Perhaps another way of looking at it is  
5       that a subset of the commercial broadcasters with  
6       revenue of about \$742 million would pay us on average  
7       about \$3.2 million, \$3.264 million in license fees  
8       under the agreements that the broadcasters had agreed  
9       to or that the courts had set and approved, and were  
10      essentially saying once we have taken out the public  
11      revenue and focused on private revenue on the public  
12      broadcasting system, to the extent that that  
13      encapsulates economic differences, that would be an  
14      appropriate fee prior to any adjustment for the way  
15      music is used for the public broadcasting stations, to  
16      reflect their relative economic importance.

17           Q       Could you quickly run through the revenue  
18      calculations for radio?

19           A       (No response.)

20           MR. SCHAEFFER:   Before you do that,  
21      shouldn't we --

22           MR. SHORE:   No.

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1 MR. SCHAEFFER: BMI people are here.

2 MR. SHORE: No. There's nothing.

3 THE WITNESS: Sure. Let me see if I have  
4 got enough room to do it here.

5 BY MR. SHORE:

6 Q Maybe you can take the formula off the  
7 top, which is on page 7 of your testimony.

8 A That's a good idea.

9 Q There's an eraser on the floor.

10 A Actually would you be able to see it if I  
11 did it on the flip chart here? Why don't we do radio  
12 over here, leaving the formula aside, just putting the  
13 numbers in.

14 In the radio case, the government  
15 publication that we were looking at previously at  
16 Appendix C, the Census Bureau survey of communications  
17 services, table 11, shows that the commercial radio  
18 stations had revenue of \$8.765 billion in 1995. So  
19 that is the revenue base there.

20 Most stations paid ASCAP in that year,  
21 licensees of \$110 million for their right to have  
22 access to and use the ASCAP repertory. So the

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1 effective rate there is 1.25 percent or \$1.25 out of  
2 every \$100 in revenue for the rights to access the  
3 music.

4 That reflects a couple of things. It  
5 reflects differences in the economic size of the  
6 industries. It also reflects differences in the way  
7 the music is used. We bargain with the radio  
8 industry. We recognize that the stations that use  
9 music at least use a lot of feature music. That is  
10 the primary focus of what they are doing to draw  
11 audience. There are news talk stations, and that is  
12 reflected in our fees as well.

13 This is really a blended and effective  
14 rate that takes account of the entire industry in  
15 their use. But it is a higher effective rate because  
16 they use more music, particularly feature uses than  
17 the television side would.

18 In terms of the revenue from public  
19 broadcasting, that was what was on the flip side there  
20 of \$276.5 million after we deducted the revenue from  
21 the public sources, the private sources. So that goes  
22 into the equation. You if you multiply the two, that

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1 would give you a figure of \$3.456 million, or that's  
2 what commercial radio broadcasters with revenue of  
3 \$276.5 million would pay in fees on average based on  
4 the agreements they have negotiated over time and that  
5 were in effect in 1995.

6 We're saying that having excluded the  
7 public funding and gotten down to private revenue on  
8 the radio side, that seems like an appropriate fee to  
9 be paid here, again, before any analysis or  
10 examination of similarities or differences and the way  
11 music is used by the public stations and commercial  
12 stations.

13 Q I am going to ask one more question before  
14 we close the hearings. Would you explain why you made  
15 music use adjustments to these fees which you have put  
16 on the board?

17 A There are a couple of reasons. One, to a  
18 certain extent the music use is built into the  
19 effective rate. As I just mentioned, one of the  
20 reasons the radio rate is 1.25 percent is because they  
21 use more music, particularly featured music. For  
22 music using stations, that is the staple of their

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1 programming that they use to attract audience and  
2 generate revenue. So there are differences between  
3 radio and television to start with.

4 Another is that at least anecdotally, and  
5 from prior experience with the survey, we knew that  
6 public broadcasting uses different amounts of music  
7 and uses music in different ways generally. Music  
8 programming is very important to the public  
9 broadcasters. It is particularly important during  
10 pledge periods. You see a lot more use of music  
11 programming that generate a lot of the revenue. So we  
12 felt that we ought to take a look at that and see if  
13 there were similarities or differences.

14 Another reason is that in one of the court  
15 cases we had when we dealt with Judge Connor for  
16 determination of the fees for two of the television  
17 networks, the ABC and CBS networks, that was one of  
18 the factors the judge looked at. He said that revenue  
19 in music use were appropriate to consider. That is  
20 after all the product they are buying, access to our  
21 repertory, use of our repertory, so we wanted to  
22 examine the facts and see if adjustments were

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1 necessary.

2 MR. SHORE: Okay. At this point we can  
3 either break for lunch and keep the closed hearings to  
4 one small session or we can close and then break for  
5 lunch and keep it closed. Because I think it will take  
6 probably a half hour or 40 minutes to get through the  
7 closed portion of the hearings.

8 CHAIRPERSON GRIFFITH: Mr. Rich, what is  
9 your schedule again?

10 MR. RICH: I apologize for applying the  
11 ointment. I had scheduled a call at 1:10, which I  
12 guess will run until about 10 minutes to 2:00.

13 CHAIRPERSON GRIFFITH: Do you want to  
14 break now?

15 MR. SHORE: I am happy to start, but it  
16 just means closing the hearings twice and excluding  
17 people. But I'm more than happy to.

18 MR. SCHAEFFER: Why don't we break now.

19 JUDGE GULIN: If we break now, let's give  
20 Mr. Rich an opportunity to eat some lunch after his  
21 call.

22 MR. RICH: Break until 2:00 then?

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1 CHAIRPERSON GRIFFITH: We'll take our  
2 lunch and recess now. We'll reconvene at 2:00.

3 (Whereupon, at 12:42 p.m., the proceedings  
4 recessed for lunch, to reconvene at 2:00 p.m.)  
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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (2:02 p.m.)

3 CHAIRPERSON GRIFFITH: Mr. Shore, before  
4 you begin again, Judge Gulin was just reminding us  
5 that we ought to inquire of one matter.

6 JUDGE GULIN: I just wanted to remind  
7 counsel -- this is probably of particular interest to  
8 ASCAP -- that the rules permit any party to amend  
9 their official rate request until the filing of  
10 proposed findings of fact and conclusions of law. I  
11 don't think there is a requirement that it be done,  
12 but since you have amended the direct testimony of Dr.  
13 Boyle, you may wish to do that so it conforms with his  
14 testimony.

15 MR. SCHAEFFER: We will do that.

16 JUDGE GULIN: Okay.

17 CHAIRPERSON GRIFFITH: All right.

18 MR. SCHAEFFER: Thank you.

19 MR. SHORE: At this point, ASCAP would  
20 move to close the hearing, because we are going to get  
21 into matters of proprietary data. It would only be  
22 attorneys -- this will be attorneys' eyes only data.

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1 CHAIRPERSON GRIFFITH: All right. Ladies  
2 and gentlemen, we will go into executive session.  
3 Anyone in the room who is not covered by the order --  
4 all right.

5 (Whereupon, the proceedings went  
6 immediately into Executive Session.)  
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A handwritten signature in dark ink, appearing to be "K. DeFuria", is written over a horizontal line.